

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)

Review of the Commission's)
Regulations Governing Television)
Broadcasting)

) MM Docket No. 91-221

Television Satellite Stations)
Review of Policy and Rules)

) MM Docket No. 87-8

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COMMENTS OF CBS INC.

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SUMMARY

If free television is to remain a vital force in this country, the Commission must act promptly to repeal or significantly relax regulations that needlessly handicap broadcasters from effective competition with its existing and emerging dual-revenue, multichannel rivals. The television ownership regulations on which the Further Notice of Proposed Rulemaking ("Further Notice") focuses are among those most urgently in need of reform.

Regulation of television station ownership through constraints far more restrictive than those imposed by the antitrust laws derives primarily from a concern for the protection of intellectual competition. The unstated premise is that intellectual competition is more fragile than economic competition. We submit, however, that the opposite is true. Because no economic market includes the number of effective competitors encompassed by the marketplace of ideas, and because the diversity of viewpoints reflected in information/entertainment markets is far greater even than the diversity of competing owners within those markets, any market for information or entertainment that is economically competitive is per force intellectually competitive.

The Further Notice proposes criteria that are far too narrow for defining the intellectual "product markets" in which broadcast stations compete, suggesting that the immediacy, visual impact and public interest licensure of broadcast television may vest it with a unique role for which there is no perfect substitute. The relevant inquiry, however, is not whether other media are exactly like broadcast television, but whether there are a sufficient number of intellectual "gatekeepers" to assure that large television station group owners could not limit public access to new ideas. The large number of video, audio and print communications outlets nationally and in

virtually every local market assures that no such dominance is possible.

Moreover, the belief that coverage of diverse viewpoints is a function of diverse ownership overlooks the powerful economic incentives to the multiple outlet owner, as well as the owner of any outlet seeking mass circulation, to serve a wide range of audiences and provide a wide spectrum of content. Examples abound, no less in news coverage than in entertainment, of decidedly contrasting political and artistic content offered by commonly owned outlets.

Most important, where an intellectual market would be genuinely diverse without government intervention, a policy of maximizing ownership diversity for its own sake would harm fundamental First Amendment interests. Because good reporting requires significant resources, a policy of artificially diffusing media ownership over numerous small organizations artificially diminishes the capacity of the press to perform its primary function as a watchdog over government and society's other powerful institutions. Since the intellectual markets in which broadcast stations compete are richly diverse -- both in ownership and, even more so, in content - there is no independent justification on diversity grounds for the retention of any of the ownership rules at issue in this proceeding.

Nor is there is any sound economic reason for the national ownership and radio-television cross-ownership rules to be retained in any form, or for the local ownership ("duopoly") rule to be retained in its current form. To assist the Commission in evaluating the markets in which broadcast television stations compete and the extent to which the ownership rules may be necessary to preserve competition in those markets, CBS has joined with three other broadcasters in commissioning a detailed study by Economists Incorporated of the various markets postulated by the Commission ("Joint Economic Study"). The Joint Economic Study, which is being filed

separately, fully supports the conclusion that broad deregulation is appropriate.

The clearest case for total repeal exists with respect to the national ownership rule. The only markets that have any possible bearing on the rule, the national advertising market and the market for national exhibition rights to video programming, are far too unconcentrated to justify any kind of structural intervention by the government. And the fact that a media outlet located in a particular community may be jointly owned with sources in other markets has no bearing on the diversity of viewpoints available to that community.

The more efficient grouping of stations that would be permitted by repeal of the national ownership rule would result in economies through, inter alia, joint financial, legal, research and support operations, joint purchases of programming and equipment, and pooled access to scarce human resources. These economies are likely to translate into improved programming and enhanced use of the broadcast spectrum, thus advancing the Commission's goal of promoting "the best practicable broadcast service" to the public.

The Further Notice suggests as one possibility the elimination of any numerical cap on television station ownership, and an increase in the audience reach limitation to 50 percent of the nation's television homes over a number of years. Since retention of the national rule is not necessary to protect either competition or diversity, however, there is no basis for this incremental approach. The national ownership rule should be repealed in its entirety now.

There is also a clear case for narrowing the duopoly rule to a breadth congruent with its underlying purpose. The current ban on Grade B contour overlaps in commonly owned television stations is overbroad, since its effect is often to bar common ownership of stations in adjoining Dominant Market Areas ("DMAs") even though broadcast stations do not compete in any

product market with stations in other DMAs. The duopoly rule should be modified to a true same-market ownership prohibition, either by proscribing overlaps only in the Grade A contours of co-owned television stations -- as the Further Notice proposes -- or by proscribing common ownership within the same DMA of two or more television stations unless those stations have no Grade B contour overlap.

Moreover, the duopoly rule should be relaxed to permit same-market television stations to be co-owned in situations where it can be shown that such common ownership would be in the public interest. Properly defined, two of the local markets to which the rule relates -- the local delivered video program market and the local advertising market -- are at low or moderate levels of concentration. Although local markets in another potentially relevant category -- the local markets for exhibition rights to video programming -- may be more concentrated except in the largest DMAs, collusive behavior in these markets, as in the other markets relevant to the ownership rules, would be very difficult to effectuate. Because facilities, equipment, sales personnel and administrative personnel all represent major expenses for broadcast television, real economies could be achieved through common ownership of two same-market television stations. Given these potential benefits of joint operation, the Commission should permit common ownership of television stations in the same market where a showing can be made that such common ownership would promote efficiency without significantly threatening competition or diversity.

There is also a strong case to be made for the total repeal of the radio-television ("one-to-a-market") cross-ownership rule. The Further Notice suggests retention of the one-to-a-market rule in some form unless it can be shown that radio and television stations do not compete in the

same local advertising or diversity markets -- a proposition which is clearly insupportable.

However, properly defined to include radio, television and other advertising media, local advertising markets are at low levels of concentration in all the DMAs examined in the Joint Economic Study. The other category of markets arguably relevant to the rule -- the local markets in which media outlets compete for audiences -- are, properly defined, at low or moderate levels of concentration.

A preemptive structural bar to radio-television cross ownership is unnecessary to prevent anti-competitive behavior and impedes the realization of cost efficiencies that could be achieved through shared facilities and personnel. CBS submits that the rule should be eliminated. At a minimum, it should be modified to permit such cross ownership in markets where at least 15 independent broadcast "voices" would remain. When non-broadcast outlets are considered, any such market must necessarily be highly unconcentrated in all respects.

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COMMENTS OF CBS INC.

CBS Inc. ("CBS"), by its attorneys, respectfully submits these comments in response to a Further Notice of Proposed Rulemaking ("Further Notice") in which the Commission has undertaken to expand its ongoing reassessment of its television station ownership rules by proposing a "new analytic framework" within which those rules may be examined.¹ (Further

¹ The rules under consideration include, first, the Commission's broadcast television national multiple ownership rules, 47 C.F.R. §73.3555(e), which generally prohibit common ownership of (or other cognizable interest in) television stations exceeding 12 in number or 25 percent in aggregate national audience reach, based on the television household population of each station's Arbitron Area of Dominant Influence ("ADI"). For the purposes of this rule, a UHF station is attributed one-half of its ADI population. Common ownership of up to 14 stations is permitted if at least two of the stations are minority owned, and ownership of stations with an aggregate national audience reach of up to 30% is permitted if at least five percentage points derive from minority-owned stations. Also at issue are the local ownership ("duopoly") rule, 47 C.F.R. §73.3555(b), which prohibits common ownership of two or more television stations with overlapping Grade B contours, and the radio-television cross-ownership ("one-to-a-market") rule, 47 C.F.R. §3555(c), which generally prohibits common ownership of a radio and television station in the same market, as determined by the reach of specified signal strength contours.

Notice at ¶1)² To augment the extensive record already compiled in this proceeding,³ the Commission has solicited additional data and economic analysis intended to permit comprehensive evaluation of the markets in which broadcast stations compete, and assist the Commission in determining whether and to what extent ownership restrictions are necessary to protect competition and diversity. In response to numerous specific inquiries set forth in the Further Notice, CBS has joined Capital Cities/ABC, Inc. ("ABC"), National Broadcasting Company, Inc. ("NBC") and Westinghouse Broadcasting Company ("Westinghouse") in commissioning from Economists Incorporated an extensive study which assesses the analytic framework proposed by the Commission and replies in detail to the Commission's requests for data.⁴ That study, which is separately submitted today, furnishes the context and underpinning for the comments set forth below.

² Textual references to the Further Notice hereafter appear as (¶).

³ The record before the Commission includes, *inter alia*, the comprehensive report on broadcast television issued by the Commission's Office of Plans and Policy in 1991, which examined changes in the video marketplace since 1975, Broadcast Television in a Multichannel Marketplace, Office of Plans and Policy Working Paper No. 26, DA 91-817, 6 FCC Rcd 3996 (1991) ("OPP Report"); numerous responses to the Commission's 1991 Notice of Inquiry soliciting public comment on that report, 6 FCC Rcd 4961 (1991); and numerous comments in response to the Commission's Notice of Proposed Rulemaking in the instant proceeding, 7 FCC Rcd 4111 (1992), in which the Commission "propose[d] alternative means of lessening the regulatory burden on television broadcasters as they seek to adapt to the multichannel video marketplace," including relaxation of the national and local restrictions on television station ownership.

⁴ An Economic Analysis of the Broadcast Television National Ownership, Local Ownership and Radio Cross-Ownership Rules, Economists Incorporated, (May 17, 1995) ("Joint Economic Study").

INTRODUCTION

CBS brings to this inquiry the perspective of a company whose core business for more than 60 years has been, and remains, the business of broadcasting. We have staked our future on our conviction that, even in the era of the Information Superhighway, over-the-air television, and the network/affiliate system in particular, will endure as a cornerstone of the nation's video distribution system. We believe, however, that if free television is to remain a vital force in this country, the Commission must act promptly to repeal or significantly relax regulations that needlessly handicap broadcasters from effective competition. The structural regulations on which the Further Notice focuses are among those most urgently in need of reform.

In reconsidering its initial decision in 1984 to eliminate the national ownership rules for broadcast stations, the Commission stated that it wished to "proceed cautiously" in relieving broadcasting of prophylactic structural limits.⁵ CBS respectfully urges that the matter which calls for caution today is not the danger that station groups will form in a fashion which imperils economic and intellectual competition -- a possibility that appropriate enforcement of the antitrust laws will, in any event, prevent -- but the danger that free over-the-air television will not survive the competitive challenges posed by burgeoning subscriber-based multi-channel services. To be concerned about concentration rather than efficiency in what is today a remarkably unconcentrated broadcasting industry is to dress for yesterday's weather. The present hazard is that perpetuation of a regulatory philosophy rooted in another era will cause free television to wither as a mainstay of first quality programming.

⁵ Memorandum Opinion and Order, Amendment of Commission's Rules Relating to Multiple Ownership, 100 FCC 2d 74, 88 (1984) ("Multiple Ownership Reconsideration").

In its 1991 study of the video marketplace, the Commission staff predicted that broadcast television would face "intensified competition as alternative media, financed not only by advertising but also by subscription revenues, and offering multiple channels of programming, expand their reach and their audience."⁶ The study observed that "broadcast networks and their affiliates have been the big losers" in this competition thus far,⁷ and predicted that "viewers who do not subscribe to cable or other multichannel media will be made worse off by a decline in the quantity and quality of broadcast service."⁸ Each of these points was correct then, and is correct now.

The Commission must assume that unless the broadcast ownership rules have been of little effect -- which would hardly argue for their retention -- broadcasters have been prevented by those rules from achieving the ownership efficiencies that a free market would otherwise have produced. The record previously compiled in this proceeding already demonstrates that the structural rules at issue are at present either entirely unnecessary or, at the very least, needlessly broad, and that repeal or substantial relaxation of these rules would provide important benefits to the public with no material accompanying detriments. In the instant proceeding, the Commission seeks to expand this record to include both rigorous competition (antitrust) analysis to determine "how the current market structure and regulatory scheme affect competition and consumer welfare" (§16), and a "new framework for assessing diversity, which takes into account the developments in the communications marketplace and that captures the rigor of [its]

⁶ OPP Report at vii.

⁷ Id. at viii.

⁸ Id. at x.

economic analysis" (¶54). As a framework for this analysis, the Further Notice tentatively identifies a series of product markets in which it suggests television broadcast stations compete, defines the geographic scope of these postulated relevant markets, and suggests means of measuring market share (concentration) within those markets. The Commission invites comment both on the correctness of its proposed analytic framework, and on the implications of the analysis for assessment of the current structural rules as to broadcast ownership. The analysis set forth in the Further Notice itself further supports the conclusion that the broadcast ownership rules could be significantly relaxed without increasing the potential for anticompetitive conduct.⁹

The Joint Economic Study is organized to track the lines of inquiry set forth in the Further Notice. Following the Merger Guidelines used by the United States Department of Justice and the Federal Trade Commission in analyzing proposed mergers under Section 7 of the Clayton Act, the study first analyzes the markets postulated by the Commission and assesses competition in those markets.¹⁰ In light of this analysis, the Joint Economic Study then examines each of the station ownership rules in question, and concludes that the repeal or significant liberalization of the rules would promote both economic efficiency and consumer well-being.¹¹

CBS submits that the analysis now invited by the Commission, added to the persuasive record already assembled, should once and for all lay to rest any lingering concern that repeal or

⁹ As the Joint Economic Study makes clear, however, in many cases the market definitions proposed by the Further Notice are too narrow. When these markets are correctly analyzed, the case for deregulation becomes even more compelling. See pp. 25 to 37, infra.

¹⁰ Joint Economic Study at 9-59.

¹¹ Id. at 60-104.

liberalization of the ownership rules might lead to undue concentration in any relevant market.

We believe the existing record, augmented by the Joint Economic Study, decisively supports the following conclusions:

- The only markets that bear on the national ownership rules are two national markets: the national advertising market, and possibly the market for national exhibition rights to video programming. Each of these markets is unconcentrated and becoming even more so as new technologies emerge. While the Further Notice suggests as one possibility the elimination of any numerical cap on television station ownership, and an increase in the audience reach limitation to 50 percent of the nation's television homes over a number of years (§ 101), there is no necessity or basis for this incremental approach. Since there is no justification for their retention, the national ownership rules should be repealed in their entirety now.
- The current "duopoly" ban on Grade B contour overlaps between commonly owned television stations is overbroad, since its effect is often to bar common ownership of stations in adjoining Dominant Market Areas ("DMAs")¹² even though broadcast stations do not compete in any product market with stations in other DMAs. The duopoly rule should be modified to a true same-market

¹² Designated Market Areas ("DMAs") are the local television markets into which, on a county-by-county basis, the A. C. Nielsen Company divides the entire United States.

ownership prohibition, either by proscribing overlaps only in the Grade A contours of co-owned television stations -- as the Further Notice proposes (§117) -- or by proscribing common ownership within the same DMA of two or more television stations unless those stations have no Grade B contour overlap. In addition, the rule should permit same-market television stations to be co-owned in situations where it can be shown that such common ownership would promote consumer welfare without significantly threatening competition.

- The only markets relevant to the radio-television cross-ownership ("one-to-a-market") rule -- the local advertising markets, and arguably, the local markets in which media outlets compete for audiences -- are, properly defined, at low or moderate levels of concentration. Competitive analysis discloses that a preemptive structural bar to such cross-ownership is unnecessary to prevent anticompetitive behavior and impedes the realization of desirable efficiencies. Accordingly, while the Further Notice suggests retention of the one-to-a-market rule in some form unless it can be shown that radio and television stations do not compete in the same local advertising or diversity markets (§131-132) -- a proposition which is clearly insupportable¹³ -- CBS submits that the rule should be eliminated. At the least, it should be modified to prohibit such cross-ownership only in markets where fewer than 15 independent broadcast "voices" would remain.

¹³ See Joint Economic Study at Appendix D; pp. 10-15, 32-35, infra.

In Part I below, we comment on the Commission's proposed diversity analysis of television broadcasting, and consider the question whether an independent interest in the protection of diversity of ideas or outlets supports structural regulation of a marketplace in which economic competition is robust. In Part II, we examine the competitiveness of each market in which broadcast television stations compete in light of the findings of the Joint Economic Study. Finally, in Parts III through V, we assess the implications of the competitive analysis solicited by the Commission for regulatory judgments as to the national ownership rules, the duopoly rule, and the one-to-a-market rule, respectively.

I. DIVERSITY

Before turning to the economic issues with which the Commission is primarily concerned in this phase of the proceeding, CBS thinks it vitally important to comment on certain premises which underly the Commission's approach, historically and currently, to the matter of diversity of voices in broadcast markets. Regulation of television station ownership through constraints far more restrictive than would be imposed by the antitrust laws derives primarily from a concern for the protection of intellectual competition. The unstated but fundamental assumption is that competition in the marketplace of ideas is more fragile than economic competition, more susceptible to collusion and oligopolist dominance, and thus in greater need of special structural rules. CBS submits that, in fact, the opposite is true -- both because no economic market encompasses the number of effective competitors encompassed by the marketplace of ideas, and because the diversity of viewpoints provided by outlets for information and entertainment is far greater than the diversity of competing owners. We believe the evidence is overwhelming that

any market for information and entertainment that is economically competitive is perforce intellectually competitive. There is thus no independent diversity interest which requires or justifies the imposition of preemptive structural rules on broadcasters.

In the discussion below, we examine what we believe are the central premises of the proposed "diversity analysis of television broadcasting" set forth in the Further Notice. (See ¶¶54-80) As the Commission recognizes, it has traditionally equated the extent of diversity of ownership of broadcast stations, or "outlet diversity," with the extent to which different viewpoints are available to the public. (¶¶61-62)¹⁴ In this proceeding, the Commission suggests that video services may constitute a unique market for diversity purposes, thereby excluding, among other media outlets, newspapers and radio. We believe that in adopting this extraordinary premise, the Further Notice proposes an analysis which fundamentally misconstrues the outlet diversity that presently exists in the intellectual marketplace.

At the same time, the Further Notice falsely assumes that "viewpoint diversity" is a function of the diversity of ownership of media outlets. As we discuss in detail below, it is in the direct economic interest of large media companies to present material which appeals to a variety of audiences. Such owners do in fact offer a wide range of information, opinion and entertainment to the American public. The notion that large media companies do or would use

¹⁴ As the Commission notes, its "direct techniques" of promoting viewpoint diversity, i.e., through content regulation, see Further Notice at ¶58, have "fallen out of favor" due both to "changes in the marketplace -- chiefly, the large increases in the number of broadcast stations and in competition to broadcasting -- and to heightened concern over First Amendment issues." Id. at ¶59. Structural regulations intended to promote "source diversity," such as the Prime Time Access Rule and the Financial Interest and Syndication Rule, are now being reexamined and are beyond the scope of this proceeding.

their properties as a means of promoting their own political and social viewpoints, at the expense of maximizing circulation, does not withstand examination.

Finally, the diversity analysis proposed in the Further Notice takes no cognizance of the significant constitutional interests which argue against government-imposed limits on the size of press organizations. Even large media companies are scarcely the only powerful institutions, governmental or private, in our society. And in order to perform their constitutionally-intended role as watchdogs over the use and possible abuse of power by such institutions, press organizations must have the substantial resources required both to undertake in-depth reporting and to withstand the pressures which such reporting will inevitably provoke. Structural regulations which restrain the size of broadcasting companies beyond limits required by the antitrust laws plainly have the potential to suppress the vigor of a free press, and diminish both the quantity and quality of news and information made available to the American public.

With these considerations in mind, we turn to a more detailed discussion of some of the diversity issues raised by the Further Notice.

A. There Is Enormous Diversity Of Outlet Ownership In Every Intellectual Marketplace In Which Broadcasting Participates.

Every intellectual marketplace in which broadcast television participates -- and especially the news and information market, which is the traditional focus of the Commission's diversity concerns -- is, and has long been, widely diverse in every sense: in the ideas expressed, in the sources of those ideas, and in the control of the outlets through which those ideas are expressed. Historically, the diversity interest addressed most directly by the Commission's ownership rules has been the latter. (§61) Ownership regulation has been rooted in the concern that the

"gatekeepers" of the intellectual marketplace should not be concentrated, lest power develop among a small number of like-minded media owners to suppress new ideas or information that should come to the public's attention. But assessment of the actual and potential diversity of the intellectual marketplaces in which television stations compete for public attention must first rest on realistic identification of those "gatekeepers" -- the outlets through which audiences have access to politically and culturally significant information. CBS submits that the Commission's proposed definition of this market is manifestly underinclusive.

The Further Notice suggests that television may play a unique role in the intellectual marketplace for which there is no complete substitute. For example, although the Commission expressly recognizes the obvious fact that both newspapers and all-news radio provide access to information and opinion at least as extensive as television stations (§§68-69, 73), the Commission nonetheless states that it "cannot consider each radio station, or each newspaper, as being the equivalent of a broadcast television station for diversity purposes." (§74) This conclusion is said to rest on the assertions that "[t]elevision is (1) more immediate than newspapers; (2) has public interest obligations not shared by newspapers; (3) has more visual impact than either newspapers or radio; and (4) is used by more people as their primary news source than either radio or newspapers." (Id.) CBS submits that this analysis is based on fundamental misconceptions about the values served by viewpoint diversity, and the government's proper role in preserving it.

The fact that more people get most of their news from television rather than from newspapers, for example, says nothing about whether even the remotest possibility exists that large television group owners could limit public access to information or dominate debate on

public issues with their own particular opinions. What matters from the standpoint of diversity is that, in the extremely unlikely event that the television stations in a particular community were to ignore significant viewpoints, consumers in that community could turn to any number of alternatives -- including newspapers, radio stations, news magazines, and local cable channels, to name just a few.¹⁵ The fact that a majority of American adults currently prefer to use broadcast television as their primary news source is simply not a proper concern of government. Certainly it cannot justify subjecting broadcasters to structural regulations which are unnecessary to preserve economic -- and therefore intellectual -- competition.

Similarly, while we certainly do not deny the "visual impact" of television, we believe that for this Commission to base its regulatory decisions on the assumption that ideas and information may not be as effectively conveyed to the American public by words as in pictures would exhibit a highly inappropriate -- and profoundly patronizing -- attitude toward the citizens of this country. As a broadcaster which is proud of the quality of the news and public affairs programming which it presents to its viewers, CBS strongly dissents from any such pessimistic assessment of the critical faculties and intellectual habits of the American people.¹⁶

¹⁵ There is no basis for assuming that consumers would not in fact turn to other media in such circumstances. According to recent data, 61.5 percent of Americans read a newspaper every day. See "Newspapers Are Advised to Build Their Brand Identities," New York Times, April 24, 1995, p. D4. This figure would certainly increase in the event a substantial number of people became dissatisfied with television news.

¹⁶ In any event, there is no empirical or intuitive basis to presume that the visual component of broadcast television communicates ideas or information that are not and cannot be communicated by other means. There is, for instance, no more "visual" subject than war. While the contribution of television in communicating the realities of war is undeniable, the prose of Stephen Crane, the audio narratives of Edward R. Murrow, and the still photography of masters such as Carl Mydans and George Silk of Life or Joe Rosenthal of Associated Press are justly famous for their capacity to render graphic descriptions of this subject. Certainly other, less

Further, CBS perceives no basis whatsoever for the Commission's exclusion from the intellectual market of press organizations that are not subject to the public interest obligations of broadcast licensure. (§74) The "relevant market" for the purposes of diversity analysis necessarily encompasses all media outlets that do in fact provide news, information, analysis, and viewpoints, whether or not a licensing requirement compels them to do so. It is difficult to divine any sense in which the multitude of newspapers, magazines, journals and cable networks that are devoted almost entirely to the coverage of news or public affairs make less of a contribution to the diversity of viewpoints in our society than, for example, a music-oriented radio station with limited news and public affairs coverage which is licensed by the FCC. The spirited public debate that characterizes expression of viewpoints in the United States is deeply rooted in our nation's political culture, and plainly does not depend for its vitality on licensure requirements or on any governmental decree.

Finally, CBS submits that it is senseless to define the participants in the market of ideas in terms of the "immediacy" with which they can report events. The fact that television -- and, of course, radio -- can report breaking news virtually instantaneously is obviously one of the unique attributes of the medium. But it is difficult to see why newspapers should be seen as contributing any less to viewpoint diversity because their commentary on these same events will come a few hours, or even a day, later, or why Time or Newsweek, for example, should be discounted because their viewpoints are conveyed weekly. It seems too obvious to state that no issue of significance can be resolved within the time frame of a radio or television news bulletin.

"visual" subjects of public importance may be communicated as effectively in other media as they are in television.

Long before the debate on any such issue has run its course, members of the public have more than ample opportunity to consider the array of viewpoints expressed in newspapers and magazines in forming their own opinions and beliefs.

This is not to say that television makes no special contribution to the coverage of news and the expression of viewpoints. But there is no evidence that television's unique qualities confer upon it a unique ability to direct the course of public debate.¹⁷ And there is certainly no warrant for the assumption that visual, aural and print communications do not each contribute significantly to the public's knowledge of politically and artistically significant ideas.

In its 1984 review of the national ownership rules, the Commission properly made no distinction between visual and non-visual media, or between licensed and unlicensed outlets, in assessing the diversity of the intellectual marketplace in which broadcast stations participate.

Rather, the Commission stated that

"in terms of viewpoint diversity, the market includes a wide variety of active, energetic organs engaged in the dissemination of ideas, and that these instruments include not simply television and radio, but also cable, videocassette recorders, newspapers, magazines, books, and when they are in operation, MDS, STV, LPTV, and DBS, all of

¹⁷ In any event, in a democratic society, the fact that a medium is especially influential constitutes no ground for singling it out for regulation. As former Chief Justice Earl Warren observed in another context:

"[I]f the impact of the motion picture is greater than that of some other media, that fact constitutes no basis for the argument that motion pictures should be subject to greater suppression. This is the traditional argument made in the censor's behalf; this is the argument advanced against newspapers at the time of the invention of the printing press. The argument was ultimately rejected in England, and has consistently been held to be contrary to our Constitution." Times Film Corp. v. Chicago, 365 U.S. 43, 77 (1961) (Warren, C.J., dissenting).

which should be considered when evaluating diversity concerns."¹⁸

When properly defined, it is clear that the marketplace of information and ideas is phenomenally competitive. That market encompasses some 1,164 commercial television stations¹⁹ owned by at least 478 different firms;²⁰ 363 educational television stations,²¹ most independently owned; 11,351 cable systems²² owned by 482 MSOs;²³ and 11,767 radio stations²⁴ with widely diversified ownership. And, according to figures submitted in connection with the Commission's 1984 review of its multiple ownership rules, that market also encompasses some 1,711 daily newspaper owned by a total of 682 firms; 1500 consumer magazines owned by 1,110

¹⁸ Report and Order, Amendment of Commission's Rules Relating to Multiple Ownership, 100 FCC 2d 17, 26 (1984) ("Multiple Ownership"). Indeed, meaningful assessment of the diversity of gatekeepers in the intellectual marketplace in which broadcast television stations participate must take account not only of mass circulation print and electronic outlets, but all sources of information and ideas. Each such outlet, including tiny "underground" newspapers, iconoclastic journals, and cable access channels, has the potential of making some important contribution to the stimulation of society's collective thought processes. The zeal with which totalitarian societies protect their press monopolies, and pursue even the smallest underground press, bears witness to the proposition that a good idea disseminated even to a few people has an impact far beyond the number of persons to whom it is initially circulated. And in this country, many ideas that eventually gathered large political followings were originally disseminated in very small publications, from the abolitionist publications of the pre-Civil War period to the anti-war "underground" press of the 1960's.

¹⁹ "By the Numbers," Broadcasting & Cable, May 8, 1995, p. 105.

²⁰ Television & Cable Factbook No. 63 -- TV Stations 1995, p. A 1361-1394.

²¹ "By the Numbers," Broadcasting & Cable, May 8, 1995, p. 105.

²² Television & Cable Factbook No. 63 -- Cable Systems 1995, p. ix.

²³ Broadcasting & Cable Yearbook 1995, Vol. 1, pp. D3-D57.

²⁴ "By the Numbers," Broadcasting & Cable, May 8, 1995, p. 105.

firms; 4,742 business publications owned by 3,161 firms; 200 farm publications owned by 164 firms; and 7,497 non-daily newspapers and 4,507 other periodicals owned by innumerable firms.²⁵ Soon many more participants, such as MMDS, DBS and telcos, will add their contributions to public understanding of news and public affairs.

Local markets throughout the United States -- from the most populous to the comparatively small -- demonstrably encompass a diverse array of press outlets. No fewer than 8.66 broadcast television stations can be received over the air in the average American home²⁶ -- representing, for 62% of television homes, just a fraction of the channels brought into the home by cable. Many of these cable channels are substantially devoted to coverage of local issues, typically including public access channels, community access channels and, in a growing number of markets, a local all-news channel. Local markets are also served by a plethora of commercial and noncommercial radio stations. Even the 25 smallest television markets are each served, on average, by no fewer than nine commercial radio stations, while the 25 largest television markets have, on average, at least fifty commercial radio stations.²⁷

Local markets are also served by at least one daily newspaper, and frequently more.²⁸ In many areas, the daily newspaper of a large core city competes for both readers and

²⁵ CBS Comments in Gen. Docket No. 83-1009, citing Standard Rate and Data Service, Inc., Editor and Publisher Yearbook, 1983 and CBS Office of Economic Analysis.

²⁶ Joint Economic Study at 61.

²⁷ Revision of Radio Rules and Policies, 7 FCC Rcd. 2755, 2773-77 (1992) ("Radio Ownership").

²⁸ In recent years, several large markets that appeared destined for, effectively, permanent one-newspaper status have spawned major second newspapers, prominently including the Los Angeles Daily News, which in the mid-1980's began to challenge the Los Angeles Times for circulation, primarily in the San Fernando Valley; and the Washington Times, which has

advertisers with daily newspapers targeted to specific suburban and exurban areas in the same metropolitan region. Local markets are also typically served by numerous weekly community newspapers, as well as by public forums, lecture series, discussion groups and community newsletters all devoted to the discussion of civic issues. The fact is that in virtually every local market in the United States, there is substantial room for communications outlets to merge without even remotely threatening the market's overall outlet diversity.

Indeed, so diverse are the intellectual markets in which broadcast television stations compete that no group owner, however large, could hope to dominate debate on public issues with a single viewpoint, even if it set out to do so. And as we show below, it is in any event highly unlikely that any large media owner would attempt such a course.

B. The Diversity Of Viewpoints Reflected In The Intellectual Marketplaces In Which Broadcast Stations Compete Is Greater Than The Ownership Diversity In These Marketplaces.

The Further Notice notes that the Commission has "traditionally equated an increase or decrease in outlet diversity with a corresponding change in viewpoint diversity." (¶62) It also observes, however, that "there is information suggesting that it may be possible to have a decrease in outlet diversity without a corresponding decrease in viewpoint diversity."²⁹ As stated in the Further Notice,

competition in New York City has been joined by a fourth contender, New York Newsday, which circulates primarily in Queens, Brooklyn and Manhattan.

²⁹ Id. The Commission notes, for example, that the record in its previous multiple ownership proceeding supports the view that "group television station owners generally allow local managers to make editorial and reporting decisions autonomously and that group-owned stations are more likely than others to editorialize."